

**United States Department of Labor
Employees' Compensation Appeals Board**

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 16-1389
Issued: March 21, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 23, 2016 appellant, through counsel, filed a timely appeal from a May 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an injury on August 21, 2012 in the performance of duty, as alleged.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) on June 4, 2015, alleging that he injured his left shoulder on August 21, 2012 while he was pushing a cart across the street and hit a pothole in the performance of his federal duties.

In a May 21, 2014 routing slip, appellant asserted that on August 21, 2012 at approximately 2:45 p.m., he was crossing a street and “a cart stopped short because of a pothole,” causing an injury to his left shoulder. He noted that he did not inform anyone about the incident at the time because he was in severe pain. Appellant advised that the pain became so severe that he underwent a magnetic resonance imaging (MRI) scan on August 27, 2012.

By letter to appellant dated June 19, 2015, OWCP advised him that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It informed him that the evidence he submitted was insufficient to establish that he actually experienced the incident or employment factor alleged to have caused his claimed injury and noted that the employing establishment indicated on the Form CA-1 that it was controverting his claim because he “Filed after 30 days of injury.” OWCP asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and a medical opinion explaining the cause of any diagnosed condition.

In a July 2, 2015 response to OWCP’s June 19, 2015 developmental letter, appellant asserted that, upon returning to the station after his injury, he immediately informed management that he had pain in his shoulder. He responded “no” to a question of whether he had sustained any other injury, either on or off duty, between the date of injury and the date it was first reported to his supervisor and to a physician. In response to the question of why he delayed reporting his injury or filing his claim, he asserted that management had procrastinated submitting his paperwork.

A report received by OWCP on July 16, 2015, indicated that appellant underwent a left shoulder MRI scan on August 27, 2012. The results of this test showed degenerative changes at the left acromioclavicular (AC) joint, with no acute fracture, dislocation, or lesion. Appellant also had significant acromial spurs, productive spurring, and glenoid and greater tuberosity.

In a September 20, 2012 report, received by OWCP on July 16, 2015, Dr. Adam Cohen, a specialist in orthopedic surgery, advised that appellant had undergone rotator cuff repair surgery in 2003. He noted that appellant had been experiencing left shoulder stiffness and pain for approximately one year, which he rated as a 7 on a scale of 1 to 10. Dr. Cohen related that he denied having any instability, weakness, numbness, or tingling in the left shoulder. He reported that appellant underwent an x-ray of the left shoulder on August 27, 2012, which showed mild degenerative changes of the left AC joint, an osteophyte at the inferior glenoid, and some calcification at the insertion of the rotator cuff at the greater tuberosity. Dr. Cohen advised that on examination of the left shoulder and upper arm there was no evidence of asymmetry, swelling, erythema, atrophy, or tenderness with palpation of the AC joint or bicipital groove. He scheduled appellant for a magnetic resonance imaging (MRI) scan of his left shoulder to rule out rotator cuff tearing.

An October 24, 2012 report of the left shoulder MRI scan, received by OWCP on July 16, 2015, indicated that appellant had irregular full-thickness tearing at the anterior margin of the supraspinatus tendon insertion.

In a November 8, 2012 report, Dr. Cohen noted that appellant underwent a left shoulder MRI scan, which showed a full-thickness tear of the anterior aspect of the supraspinatus tendon, and was considering surgery to ameliorate this condition.

In a September 13, 2013 report, Dr. Cohen advised that appellant had undergone left shoulder, arthroscopic rotator cuff repair surgery and that his condition had significantly improved since his last visit. He reported that appellant was undergoing physical therapy on his left shoulder, but was still experiencing some stiffness.

By decision dated July 24, 2015, OWCP denied the claim, finding that appellant had failed to meet his burden of proof to establish the medical component of fact of injury. It found that, although his personal statement and the responses to the June 19, 2015 developmental letter were sufficient to establish the factual portion of his claim, the medical evidence of record was insufficient to support that he sustained an injury in connection with the August 21, 2012 work incident. OWCP advised that the circumstances of his alleged injury were unclear and that the diagnostic test results did not provide any history of injury or a medical opinion regarding his condition. The narrative reports from Dr. Cohen did not provide any history or explanation as to whether or how his claimed left shoulder condition was causally related to his employment.

Appellant resubmitted several reports from Dr. Cohen from 2015 in which he documented treatment of a left shoulder injury and recorded findings on examination, but did not indicate whether appellant's left shoulder symptoms stemmed from the August 21, 2012 employment incident. In a February 25, 2015 report, Dr. Cohen advised that appellant continued to experience left shoulder pain and weakness. He noted that a left shoulder MRI scan showed a new tear of the left rotator cuff. Dr. Cohen reported that he was considering a repeat surgery to repair his rotator cuff.

By letter dated August 7, 2015, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 17, 2016. He stated at the hearing that he had left shoulder surgery in 2012, which he thought was work related, but did not file a claim. Appellant further indicated that Dr. Cohen told him that his left shoulder symptoms resulted from years of wear and tear. He then stated that he injured his shoulder on August 21, 2014 when a pushcart hit a pothole while he was crossing a street. Appellant stated that the pushcart was heavy with mail on three sides and that when the wheel went into the pothole he felt it jerking his shoulder like a tingling sensation. He asserted that when he returned to the station he informed the station manager that he had injured his shoulder and that he felt the same left shoulder pain that he had experienced in 2012. Appellant stated that he immediately sought medical care after the August 21, 2014 incident, but was told by management to put down August 21, 2012 on the Form CA-1 and routing slip.

In an April 19, 2016 letter to OWCP, L.C., a management human resources specialist for the employing establishment, advised that she received a Form CA-1 claim for appellant on June 9, 2015, which indicated that he sustained a traumatic injury on August 21, 2012. She noted that he had stopped work on April 4, 2015 and that she had advised him that he was not entitled to continuation of pay because he failed to file his claim within 30 days of the alleged

injury. L.C. reported that appellant was very upset and demanded an explanation as to why he was not entitled to continuation of pay. She advised that he did not notify her that he was also injured in 2014. L.C. asserted that, as a human resources specialist, she does not challenge an employee on what date to use regarding any injury.

In a letter to OWCP dated May 9, 2016, appellant advised that he was not seeking continuation of pay for the alleged 2012 injury. He noted that when he was injured in 2012 he did not file a claim, but went off work on medical leave, using his sick leave and annual leave to cover his time off from work. Appellant advised that the injury for which he was seeking continuation of pay occurred in 2014 and was not related to the 2012 injury. He asserted that management provided him with inaccurate information regarding the proper forms he needed to file. Appellant alleged that, although L.C. told him that he needed to fill out a Form CA-1, his union representative advised him to fill out a Form CA-2.

By decision dated May 27, 2016, an OWCP hearing representative affirmed the July 24, 2015 decision denying his traumatic injury claim for a left shoulder injury. She modified the decision in part, however, finding that appellant failed to meet his burden to establish the factual component of fact of injury. OWCP's hearing representative found that there were inconsistencies in the record which cast serious doubt on the validity of his claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.⁶ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁷

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place, and in the

³ *Supra* note 2.

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(e)(e).

manner alleged, or whether the alleged injury was in the performance of duty,⁸ nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of FECA. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.⁹ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee’s statements in determining whether he or she has established his or her claim.¹⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that an incident occurred on August 21, 2012 while he was pushing a cart across the street and hit a pothole. He initially made this assertion on his May 21, 2014 routing slip and reiterated this account on his June 4, 2015 Form CA-1. This assertion, however, is contradicted by his March 17, 2016 hearing testimony in which he stated that the alleged incident occurred on August 21, 2012. It was also contradicted by his assertions that management and L.C. told him to write August 21, 2012 as the date of injury on the CA-1 form and routing slip. Appellant has asserted that management provided him with inaccurate information regarding the process for filing a claim and that it procrastinated filing his claim. However, he has provided no documentation or corroboration to support these assertions. The Board notes that L.C. advised in her April 19, 2016 letter that she does not challenge an employee on what date to use regarding any injury. In this letter L.C. reported that appellant listed August 21, 2012 as the date of injury on his June 4, 2015 Form CA-1 and advised that he did not notify her that he sustained an injury in 2014.¹¹

Based on the instant record, therefore, there are discrepancies in the accounts of injury appellant provided to different people. This contradictory evidence created an uncertainty as to the time, place, and in the manner in which appellant sustained his alleged left shoulder injury. Further, none of the medical reports appellant submitted indicated that he was being treated for a left shoulder injury which occurred on August 21, 2012. Appellant stated at the hearing that he underwent left shoulder surgery in 2012, but was told by Dr. Cohen that his left shoulder symptoms resulted from years of wear and tear. As noted above, circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment cast doubt on an employee’s statements in determining whether he or she has established his or her claim. Lastly, appellant failed to submit to OWCP a corroborating witness statement in response to its request. This casts additional doubt on appellant’s assertion that he injured his left shoulder on August 21, 2012 while

⁸ *Pendleton*, *supra* note 5.

⁹ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹⁰ See *Constance G. Patterson*, 42 ECAB 206 (1989).

¹¹ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. See generally *Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

he was pushing a cart across the street and hit a pothole. OWCP requested that appellant submit additional factual and medical evidence explaining how he sustained an injury to his left shoulder on the date in question. Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that he sustained an injury in the performance of duty as alleged.¹²

For the reasons stated above, the Board finds that appellant has failed to meet his burden of proof to establish fact of injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly found that appellant failed to meet his burden of proof to establish an injury in the performance of duty on August 21, 2012, as alleged.

¹² See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board